

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1055

**ANTHONY NOTTAGE,**

Petitioner,

-VS-

**STATE OF FLORIDA,**

Respondent.

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**BRIEF OF PETITIONER ON JURISDICTION**

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ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE DISTRICT COURT OF APPEAL  
OF FLORIDA, THIRD DISTRICT

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## **INTRODUCTION**

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *Nottage v. State*, 34 Fla. L. Weekly D993 (Fla. 3d DCA May 20, 2009), on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the attached appendix, paginated separately and identified as “A” followed by the page number.

## **STATEMENT OF THE CASE AND FACTS**

The relevant proceedings in the trial court, as summarized in the opinion of the district court of appeal, are as follows:

The State of Florida charged Nottage with numerous crimes, including attempted first-degree felony murder, kidnapping, three counts of sexual battery, attempted sexual battery, aggravated battery, burglary, child abuse, and grand theft of a motor vehicle. The jury began deliberations at 6:25 p.m. on a Friday. At the start of deliberations, the trial court informed the jury that it would “probably call it a night” at approximately 7:30 p.m. and have the jury return the following Monday, if the jury had not arrived at a verdict by that time.

During deliberations, the jury sent a note in which the jurors asked if alternate jurors could join in the deliberations “for more opinions.” At 7:30 p.m., the trial court sent the jury a note stating that “only six of you can decide the case. We are going to recess for the evening.” The trial court thereafter dismissed the jury for the evening.

Deliberations continued the following Monday at 9:30 a.m. At that point, the trial court advised counsel that, after the jurors were sent home on Friday night, one of the jurors remained behind and expressed concerns for her safety because she lived and worked in the same community as some of the individuals connected to the case. The defense moved for a mistrial. The trial court conducted an inquiry of the juror, and the juror assured the trial court that she could

continue with her deliberations. The trial court denied the motion for mistrial.

At approximately 11:00 a.m. that same day, the jurors resumed deliberations. Soon thereafter, the jurors sent a note that read as follows:

First degree: Four yes; maybe, one; no, one.

Kidnapping: Four, yes; no, two.

Sexual battery: Yes, five; no, one.

Aggravated battery: Yes, four; maybe, two.

Burglary, trespassing: Yes, five; no, one.

The Allen charge is contained in Florida Standard Jury Instruction (Criminal) 3.06, which reads as follows:

I have only one request of you. By law I cannot demand this of you, but I want you to go back into the jury room, then, taking your turns, tell each of the other jurors about any weaknesses of your own positions. You shall not interrupt each other's comments or each other's views until each of you have had a chance to talk.

After you have done that, if you simply cannot reach a verdict, then return to the courtroom and I will declare this case mistried, and will discharge you with my sincere appreciation for your services. You may now retire to continue with your deliberations. Thank you, Ladies and Gentlemen.

After reading these instructions, the jury resumed deliberations at approximately 4:00 p.m.

Around 4:55 p.m., the jury sent another note that read as follows: “[W]e are still five to one, all the way down.” Because the judge had failed to admonish the jury not to disclose the numerical results of their votes during deliberations as instructed in the Thomas<sup>FN2</sup> case, it now became clear that there was a lone holdout in the jury room. The trial court dismissed the jurors for the evening.

FN2. Thomas v. State, 748 So.2d 970 (Fla.1999).

The proceedings resumed the following day at approximately 10:00 a.m. The trial court then advised counsel that one of the jurors previously had asked the bailiff for a private conversation with the judge, which the trial court did not permit.

Defense counsel moved for a mistrial based upon the note in which the jury indicated that there was a vote of five to one and the exchange that occurred between the juror who requested a private conversation with the judge. The trial court denied the motion and ordered the jury at approximately 10:50 a.m. to continue with deliberations.

A short time thereafter, the trial court received the following note from the jury:

[Juror's name] would like to be removed from this trial. It is causing me a great deal of stress, because I cannot come to a decision on this matter. I thought I could be fair and impartial, but I am trying very much so, but, sir, could you please excuse me?

The trial court summoned the attorneys to the courtroom. About ten minutes elapsed before all the lawyers returned to the courtroom. At that point, the jury sent out the completed verdict forms, finding Nottage guilty as charged on all counts. Defense counsel again moved for a mistrial, arguing that the jury had been deadlocked after the jury sent the note that followed three days of deliberations. The trial court denied the motion.

(A. 2-5).

On appeal to the Third District Court of Appeal, Nottage argued that a new trial was warranted based upon numerous cases that had reversed guilty verdicts returned by a jury after the trial court ordered the jury to continue deliberations

following an *Allen*<sup>1</sup> charge and a subsequent jury deadlock (A. 6). In its decision, the district court of appeal acknowledged that the Fourth District Court of Appeal had adopted a per se rule mandating a mistrial after a jury is still deadlocked after an *Allen* charge, citing *Tomlinson v. State*, 584 So.2d 43 (Fla. 4th DCA 1991), *Rubi v. State*, 952 So.2d 630 (Fla. 4th DCA 2007) and *Washington v. State*, 758 So.2d 1148 (Fla. 4th DCA 2000) (A. 6-8). However, the Third District refused to adopt the per se rule adopted by the Fourth District:

No other district court has adopted a per se rule mandating a mistrial after the jury is still deadlocked after an Allen charge. This Court, in Warren, 498 So.2d at 472, employs a more flexible standard to conclude that the trial court committed fundamental error.

(A. 8). Applying its more flexible standard rather than the Fourth District's per se rule, the Third District held that the trial judge did not commit reversible error by denying the defense motion for mistrial and ordering the jury to continue its deliberations after the jury reported that it was still deadlocked after the jury was given an *Allen* charge (A. 9-11).

A notice invoking this Court's discretionary jurisdiction based on express and direct conflict of decisions was filed June 12, 2009.

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<sup>1</sup>*Allen v. United States*, 164 U.S. 492 (1896).

## SUMMARY OF ARGUMENT

The Fourth District Court of Appeal has adopted a per se rule mandating a mistrial when a jury is still deadlocked after receiving an *Allen* charge, and that court has concluded that its per se rule was implicitly approved by this Court in *Thomas v. State*, 748 So.2d 970 (Fla.1999). In the present case, the Third District Court of Appeal expressly rejected the Fourth District's per se rule, adopted a totality of the circumstances test, and concluded that such a totality of the circumstances test is required by this Court's decision in *Thomas*. Under these circumstances, petitioner respectfully submits this Court should exercise its discretionary jurisdiction to review the decision of the district court of appeal in this case, resolve the conflict generated by that decision, and establish the proper rule to be applied in determining whether a mistrial is required when a jury is still deadlocked after receiving an *Allen* charge.



## ARGUMENT

**THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE, WHICH EXPRESSLY REJECTS THE FOURTH DISTRICT COURT OF APPEAL'S PER SE RULE MANDATING A MISTRIAL WHEN A JURY IS STILL DEADLOCKED AFTER AN ALLEN CHARGE IS GIVEN, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FOURTH DISTRICT IN *Tomlinson v. State*, 584 So. 2d 43 (Fla. 4th DCA 1991), *Washington v. State*, 758 So. 2d 1148 (Fla. 4th DCA 2000), AND *Rubi v. State*, 952 So. 2d 630 (Fla. 4th DCA 2007).**

The two principal circumstances that support this Court's jurisdiction to review district court decisions based upon alleged express and direct conflict are (1) the announcement of a rule of law that conflicts with a rule previously announced by this Court or another district court; or (2) the application of a rule of law to produce a different result in a case that involves substantially similar controlling facts as a prior case disposed of by this Court or another district court. *Wallace v. Dean*, 3 So.3d 1035, 1039 (Fla.2009); *Nielsen v. City of Sarasota*, 117 So.2d 731, 734 (Fla.1960). In the present case, the Third District Court of Appeal announced a rule of law that conflicts with a rule previously announced by the Fourth District Court of Appeal.

In *Tomlinson v. State*, 584 So.2d 43 (Fla. 4th DCA 1991), the Fourth District Court of Appeal rejected a totality of the circumstances test and adopted a per se rule that once an Allen charge is given to the jury, it is fundamental error for a trial

court to send the jury back for further deliberations, after it announced a second deadlock, with further instructions given:

We adopt the per se approach as correct and express agreement with the rationale in *Seawell* and *Warren*. We hold that it was fundamental error for the trial court herein to send the jury back for deliberations, after it announced a second deadlock, with the instruction given. We reverse appellant's conviction and sentence for first-degree murder and remand this case for a new trial.

*Tomlinson*, 584 So.2d at 45.

The Fourth District reaffirmed this per se rule in *Washington v. State*, 758 So.2d 1148 (Fla. 4th DCA 2000):

Once the *Allen* charge is given, flexibility is lost and the trial crosses the river of no return. As we held in *Tomlinson v. State*, 584 So.2d 43, 45 (Fla. 4th DCA 1991), it is per se reversible error to repeat a deadlock jury instruction and send a jury back for further deliberations after it has announced a second deadlock.FN4

FN4. The supreme court cited *Tomlinson v. State*, 584 So.2d 43 (Fla. 4th DCA 1991), with approval in *Thomas v. State*, 748 So.2d 970, 979 (Fla. 1999).

*Washington*, 758 So.2d at 1154.

The most recent reaffirmation of the Fourth District's per se rule is *Rubi v. State*, 952 So.2d 630 (Fla. 4th DCA 2007):

This court has held that it is fundamental error for the trial court to repeat a deadlock jury instruction and send a jury back for further deliberations after it has announced a second deadlock. *Tomlinson v. State*, 584 So.2d 43, 45 (Fla. 4th DCA 1991). If the second note that the jury sent out is construed to be a second announcement of deadlock, then *Tomlinson* requires reversal.

*Rubi*, 952 So.2d at 633-34. The per se rule adopted by the Fourth District is consistent with the language of the *Allen* charge which tells the jury that after deliberations resume following the *Allen* charge, “if you simply cannot reach a verdict then come back to the courtroom and I will declare this case a mistrial and we’ll discharge you for your services.” Florida Standard Jury Instruction (Criminal) 3.06 (emphasis supplied).

In its decision in this case, the Third District Court of Appeal acknowledged that the Fourth District Court of Appeal had adopted a per se rule mandating a mistrial when a jury is still deadlocked after receiving an *Allen* charge, citing *Tomlinson*, *Washington* and *Rubi* (A. 6-8). However, the Third District refused to adopt the per se rule adopted by the Fourth District, and instead utilized the totality of the circumstances test which had been rejected by the Fourth District in *Tomlinson*:

No other district court has adopted a per se rule mandating a mistrial after the jury is still deadlocked after an Allen charge. This Court, in Warren, 498 So.2d at 472, employs a more flexible standard to conclude that the trial court committed fundamental error.

(A. 8). The Third District concluded that the Fourth District’s per se rule “would be in conflict with *Thomas*, which stated that the standard of review was whether, under the totality of circumstances, the trial court’s actions were coercive. *See Thomas*, 748 So.2d at 976.” (A. 10). Utilizing the totality of the circumstances test rejected by the Fourth District in *Tomlinson*, the Third District concluded that

“under the totality of the circumstances here, the trial court did not commit reversible error recessing the trial until the following day after giving the *Allen* charge.” (A. 11).

Thus, the Fourth District Court of Appeal has adopted a per se rule mandating a mistrial when a jury is still deadlocked after receiving an *Allen* charge, and that court has concluded that its per se rule was implicitly approved by this Court in *Thomas*. In the present case, the Third District Court of Appeal expressly rejected the Fourth District’s per se rule, adopted a totality of the circumstances test, and concluded that such a totality of the circumstances test is required by this Court’s decision in *Thomas*. Under these circumstances, petitioner respectfully submits this Court should exercise its discretionary jurisdiction to review the decision of the district court of appeal in this case, resolve the conflict generated by that decision, and establish the proper rule to be applied in determining whether a mistrial is required when a jury is still deadlocked after receiving an *Allen* charge.

## **CONCLUSION**

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 17th day of June, 2009.

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HOWARD K. BLUMBERG  
Assistant Public Defender

### **CERTIFICATE OF FONT**

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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HOWARD K. BLUMBERG  
Assistant Public Defender